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RECENT DECISIONS.

ARTHUR BEARNS BRENNER, *Editor-in-Charge.*
JAMES ALGER FEE, *Associate Editor.*

BANKS AND BANKING—DOUBLE LIABILITY OF STOCKHOLDERS—POWER OF TRUSTEE IN INSOLVENCY.—The trustee of an insolvent bank attempted to enforce by suit the double liability of the stockholders. *Held,* he could recover. *Clark* v. *Bank of Union* (W. Va. 1913) 78 S. E. 785.

On strict theory, it is difficult to support this decision. The double liability of stockholders is created by statute for the exclusive benefit of creditors, and it is not an asset or property right of the company. It should not, therefore, pass to the trustee, who receives by the assignment only the property of the corporation. *Runner* v. *Dwiggins* (Ind. 1897) 46 N. E. 580; *cf. Thompson* v. *Knight* (N. Y. 1902) 74 App. Div. 316. While it is true that the trustee as representative of both the corporation and its creditors is enabled to enforce some corporate rights which the corporation itself might be estopped from asserting, *Franklin Nat. Bank* v. *Whitehead* (1897) 149 Ind. 560, yet he is not empowered to sue on a cause of action which the corporation never owned. *Wincock* v. *Turpin* (1880) 96 Ill. 135; *Runner* v. *Dwiggins, supra.* It is argued that the double liability of stockholders creates a trust of the choses in action to be recovered upon by the assignee in insolvency, *Farmers Loan Co.* v. *Funk* (1896) 49 Neb. 353, but in the absence of any express designation by legislation, or consent of the creditors, it is difficult to see how he is invested with the legal title. See *Jacobson* v. *Allen* (C. C. 1882) 12 Fed. 454. Technically, the creditors are perfectly capable of enforcing their own rights by suit in equity brought by one or more of them in favor of all who will come in and bear their part of the expense. *Zang* v. *Wyant* (1898) 25 Colo. 551; Morse, Banks & Banking (3rd ed.) § 693. Disregarding this accurate solution, some courts allow actions at law by the individual creditor, *Fidelity Insurance Co.* v. *Mechanics Sav. Bank* (C. C. A. 1899) 97 Fed. 297, a plan which engenders a multiplicity of suits and leaves the tardy or ill-advised creditor remediless. The widespread adoption by courts and legislatures of the scheme of giving a right of action to the trustees is due to its great expediency, 1 Bolles, Modern Law of Banking 150, 151, since it results in an amalgamation of suits and a distribution of proceeds on an equitable basis.

BANKS AND BANKING—TRUSTEE—DUTY OF BANK RECEIVING TRUST CHECK.—The treasurer of the plaintiff corporation, who had general authority to sign its obligations, drew a corporate check on the defendant bank payable to his own order and deposited it in his private account at another bank. On presentation, the check was paid by the defendant bank, and the treasurer misappropriated the corporate funds in his private account. *Held,* the defendant was discharged of liability to the corporation for the amount of the check. *Havana Central R. R.* v. *Central Trust Co. of N. Y.* (C. C. A. 1913) 204 Fed. 546. See Notes, p. 727.

BILLS AND NOTES—ALTERNATIVE PAYEES—JOINT OBLIGATION.—One of two persons to whom a promissory note was made payable in the alternative sued alone on the note during the lifetime of the other. *Held,*

one judge dissenting, that the obligation was joint, and a demurrer properly sustained for defect of parties plaintiff. *Passut* v. *Heubner* (Sup. Ct. 1913) 142 N. Y. Supp. 546.

Although, because of the conditional nature of the obligation and the uncertainty of the payee, an instrument payable in the alternative was invalid under the statute of 3 & 4 Anne as a promissory note, *Blankenhagen* v. *Blundell* (1818) 2 B. & Ald. 417; *Osgood* v. *Pearsons* (1855) 70 Mass. 455, it was sufficient evidence of a debt to support a recovery on the common counts, *Westgate* v. *Healy* (1857) 4 R. I. 523; *Walrad* v. *Petrie* (N. Y. 1830) 4 Wend. 575, and is now a negotiable instrument under the Uniform Act. N. Y. Laws 1909, ch. 43, § 27, sub. 5. To give effect to the apparent intention expressed by the maker, the interest has in a few cases been construed as several, and one payee allowed to maintain an action. *Ellis* v. *Lemoor* (S. C. 1827) 1 Bailey 13; *Spaulding* v. *Evans* (C. C. 1840) 2 McLean 139. Except, however, where the alternative payees can be identified in interest, as where the promise is made to a husband or wife, *Young* v. *Ward* (1859) 21 Ill. 223, or to a company or its treasurer, *Atlantic Co.* v. *Young* (1859) 38 N. H. 451, the weight of authority, as does the principal case, considers the interest as joint, and compels all the payees to join, *Westgate* v. *Healy, supra,* or achieves the same result by construing the word "or" to mean "and". *Willoughby* v. *Willoughby* (1830) 5 N. H. 244; *Parker* v. *Carson* (1870) 64 N. C. 563. An occasional decision to this effect, however, is erroneously based on older cases pertaining solely to the validity of the instrument as a promissory note. *Hayden* v. *Snell* (1857) 75 Mass. 365; *Watson* v. *Evans* (1863) 1 Hurl. & C. 662.

CITIZENSHIP—EXPATRIATION—NATIVE WOMAN MARRYING ALIEN.—A woman citizen of California married a resident British subject and both continued to reside in California. *Held,* she was not entitled to vote as a "native citizen of the United States." *Mackenzie* v. *Hare* (Cal. 1913) 134 Pac. 713.

The conflict between the traditional English conception of perpetual allegiance and the spirit of American institutions has from the very beginning caused a conflict of decisions. Some courts refused to allow expatriation from the United States without the consent of our government; *Inglis* v. *Sailors' Snug Harbour* (1830) 3 Pet. 99; *United States* v. *Gillies* (1815) Pet. C. C. 159; 2 Kent, Commentaries (12th ed.) 49 n. (a); others, unless public policy intervened, 8 Op. Atty. Gen. 139 (1856), asked only for good faith in the act of expatriation, *Talbot* v. *Janson* (1795) 3 Dall. 133; *Stoughton* v. *Taylor* (1818) 2 Paine C. C. 655, thus "presuming" the consent of Congress. *Alsberry* v. *Hawkins* (Ky. 1839) 9 Dana 177. The statement in the Preamble of the Act of July 27, 1868, which protects naturalized citizens abroad, that the right of expatriation is fundamental, is now understood as the consent of the United States to the expatriation of American citizens, *Jennes* v. *Landes* (C. C. 1897) 84 Fed. 73; but see *Comitis* v. *Parkerson* (C. C. 1893) 56 Fed. 556, and all that is now needed is an unqualified act by the individual. See *Chas. Green's Sons* v. *Salas* (C. C. 1887) 31 Fed. 73. At first women, like men, were denied the right of expatriation. *Shanks* v. *Dupont* (1830) 3 Pet. 242; *Beck* v. *McGillis* (N. Y. 1850) 9 Barb. 35. But Congress, Act of Feb. 10, 1855, specifically declared that an alien woman in the status of marriage with a citizen shall be deemed a

citizen. *Kelly* v. *Owen* (1868) 7 Wall. 496; *Kane* v. *McCarthy* (1869) 63 N. C. 299. Courts which have construed this to mean its converse as well, that an American woman in the status of marriage with an alien shall be deemed an alien, with or without residence abroad, *Ruckgaber* v. *Moore* (C. C. 1900) 104 Fed. 947; *Pequignot* v. *City of Detroit* (C. C. 1883) 16 Fed. 211; *contra,* 15 Op. Atty. Gen. 599 (1877), have finally been upheld by the Act of March 2, 1907, which specifically declares that "any American woman who marries a foreigner shall take the nationality of her husband".

CONSTITUTIONAL LAW—LIBERTY OF THE PRESS.—The relators published what purported to be a signed petition after the signers had repudiated it as having been signed under a misapprehension. *Held,* the continued publication of their names as signers might be enjoined without violating the liberty of the press. *Schwartz et al.* v. *Edrington, Judge* (La. 1913) 62 So. 660. See Notes, p. 732.

CONSTITUTIONAL LAW—POLICE POWER—RESTRICTION OF LIBERTY.—The defendant, convicted under a statute making mere possession of opium a crime, claims that the statute is unconstitutional as being an undue restraint upon his liberty. *Held,* conviction sustained. *Chino Lee* v. *United States* (1913) No. 153, Oct. Term, U. S. Sup. Ct.

Although the traffic in liquor can be prevented by the legislature, see 12 COLUMBIA LAW REVIEW 738; but see Tiedeman, Police Power 554, the courts of last resort in the various states have with practical unanimity held that the use or possession of liquor, since it does not of itself affect public health, morals or safety, is not a subject for the exercise of the police power. *Ex parte Brown* (1897) 38 Tex. Crim. 295; *State* v. *Gilman* (1889) 33 W. Va. 146. This argument against sumptuary laws, based on the theory that a man can regulate his methods of living as he pleases, so long as he does not conflict with the rights of others, is not, however, applied to the use or possession of opium, *Ex parte Mon Luck* (1896) 29 Ore. 421; *Ah Lim* v. *Territory* (1890) 1 Wash. 156, since, although the difference is only one of degree, the courts agree that even the private use of the drug will affect public health and safety. The U. S. Supreme Court, under its more liberal construction of the police power so as to include everything affecting public welfare, see 13 COLUMBIA LAW REVIEW 294, has upheld statutes which forbade the manufacture of liquor, even though not for purposes of sale. *Mugler* v. *Kansas* (1887) 123 U. S. 623; *Kidd* v. *Pearson* (1888) 128 U. S. 1. This view they justify on the ground that it is a reasonable means to the legitimate end of general prohibition, although, it is submitted, the private use of liquor is not a proper subject for the exercise of the police power. See Tiedeman, Police Power, *supra.* The Supreme Court, however, would probably apply its argument to a statute against the mere possession or use of liquor, and has naturally applied it to the case of opium.

CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—WAIVER.—The defendant was indicted under a statute declaring it to be a felony for any operator of a motor vehicle who knows that he has culpably or accidentally injured any person or property to leave the place of injury without stopping and giving his name, address, etc. The defendant demurred to the indictment on the ground that the

statute infringed his constitutional privilege against self-incrimination. *Held,* one judge dissenting, demurrer overruled. *People* v. *Rosenheimer* (N. Y. 1913) 102 N. E. 530.

For a discussion of principles applicable to this case, see 12 COLUMBIA LAW REVIEW 731. The court bases this decision on the ground that the legislature has the power to debar motor vehicles altogether from using the public roads, see 10 COLUMBIA LAW REVIEW 477, and holds that the legislature may therefore require as a condition of operating such machines that the operator waive his constitutional privilege. See 3 COLUMBIA LAW REVIEW 493.

CONTEMPT—CONSTRUCTIVE—AVOIDING SERVICE OF SUBPOENA.—The defendant concealed himself for the purpose of avoiding service of a subpœna to appear as witness. *Held,* this constituted contempt. *Aaron* v. *State* (Miss. 1913) 62 So. 419.

The extent of the power to punish for contempt is curiously vague, since it is in its nature arbitrary and appears to be limited only by the discretion of the courts. See *Ex parte Terry* (1888) 128 U. S. 289. Moreover, since this power is inherent in all courts of record, attempts to curtail it by legislation have been declared unconstitutional. *State ex inf. Crow* v. *Shepherd* (1903) 177 Mo. 205; *cf. State ex rel. Att'y Gen'l* v. *Circuit Court* (1897) 97 Wis. 1; see Thomas, Constructive Contempt, 16. But the courts, in the cautious exercise of their discretion, or on the theory that the statute in question is merely declaratory of the common law, see Rapalje, Contempt, § 1, are inclined to follow the declaration of legislative policy. *Broderick* v. *Genesee Circuit Judge* (1900) 125 Mich. 274. Moreover, since such statutes generally retain the common law idea that a person who by any act intentionally obstructs the course of justice is guilty of contempt, U. S. Rev. Stat. § 725; see *Skipworth's Case* (1873) L. R. 9 Q. B. 230, an intentional disobedience of any mandate or interference with process of a law court, when the order has been served, would in any jurisdiction be punishable as contempt. *State ex rel. Bovee* v. *Herron* (1872) 24 La. Ann. 619; see 4 Bl. Comm. *285. But in equity the rule is established that a defendant is guilty of contempt for knowingly violating an injunction, although not himself a party to the suit, nor served with a process. *Chisolm* v. *Caines* (C. C. 1903) 121 Fed. 397; *People ex rel. Stearns* v. *Marr* (1905) 181 N. Y. 463. As no valid distinction can be drawn between equity and law courts in this respect, inasmuch as each derives its power from the same source, it would seem that the wilful disregard of the process of the latter, being manifestly an intentional obstruction of justice, would fall within the common law conception.

CORPORATIONS—FOREIGN CORPORATIONS—INTERNAL AFFAIRS.—A New York corporation made a conveyance of land situated in Colorado. One of its stockholders brought suit in Colorado against the corporation and the grantee to set aside the deed on the grounds that no quorum was present at the meeting which authorized the deed, and that the transaction was in fraud of the stockholders. *Held,* by one judge, that the suit would involve interference with the internal affairs of a foreign corporation, and that consequently the court should decline jurisdiction. *Holmes* v. *Jewett* (Colo. 1913) 134 Pac. 665. See Notes, p. 734.

CORPORATIONS—STOCKHOLDER'S LIABILITY ON UNPAID SUBSCRIPTION—PAYMENT OF STOCK IN PROPERTY.—The defendants purchased stock in a corporation with property worth only 20% of the par value of the stock, expecting the property to rise in value. In a suit by creditors of the corporation, *held,* they may recover from the stockholders the difference between the par value of the stock and the value of the property. *Herron Co.* v. *Shaw* (Cal. 1913) 133 Pac. 488.

Payment for stock may be made in property, *Brant* v. *Ehlen* (1882) 59 Md. 1, and if its reasonable value be equal to the price of the stock at par, the transaction cannot be impeached by creditors, see *Van Cleve* v. *Berkey* (1898) 143 Mo. 109, but where the property has been intentionally overvalued the difference can be recovered from the original stockholder, *Kelly* v. *Mining Co.* (1898) 21 Mont. 291, or from a transferee with notice, *Wishard* v. *Hansen* (1896) 99 Ia. 307, but equity protects the purchaser without notice. *DuPont* v. *Tilden* (C. C. 1890) 42 Fed. 87. This right of the creditor is based upon the theory that he has been misled by fraudulent representations, for he had a right to assume that the value of the outstanding capital stock represented assets of the corporation; since unpaid subscriptions constitute a trust fund for his benefit, *Sawyer* v. *Hoag* (U. S. 1873) 17 Wall. 610, he cannot be prejudiced by any transaction between the stockholder and the corporation. The trust conception, however, is anomalous in that, as in the principal case, the creditor is often given the right which in strict theory should belong to the trustee in insolvency, since it is, in fact, a right of the corporation which it would be prevented from enforcing by estoppel. Actual overvaluation with intent to do so should constitute sufficient misrepresentation to subject the stockholder to liability, *Scovill* v. *Thayer* (1881) 105 U. S. 143; *State Trust Co.* v. *Turner* (1900) 111 Ia. 664, as being fraud in law; some courts nevertheless require proof of fraud *aliunde, Coffin* v. *Ransdell* (1886) 110 Ind. 417, but all substantially agree that gross overvaluation shall be *prima facie* evidence of fraud *per se. Coleman* v. *Howe* (1895) 154 Ill. 458. On the other hand, if the creditor is aware of the overvaluation, no fraud can be said to have been perpetrated upon him, and he should be estopped from making claim. *Adamant Mfg. Co.* v. *Wallace* (1897) 16 Wash. 614; but see *Sprague* v. *Bank* (1898) 172 Ill. 149.

CRIMINAL LAW—DOUBLE JEOPARDY—BURGLARY AND LARCENY COMMITTED IN ONE TRANSACTION.—The defendant was prosecuted on an information alleging, in a single count, breaking and entering a building with intent to steal, and committing a larceny within. Before the trial began, the charge of larceny was quashed, and, soon after its commencement, the charge of burglary was also quashed. Subsequently, on a second information filed on the same charge, the defendant was convicted of larceny, his plea of former jeopardy being overruled. *Held,* the commencement of the trial on the charge of burglary, even though the defendant was thereby placed in jeopardy, was no bar to a prosecution for larceny, which is an independent offense. *Ex parte Gano* (Kan. 1913) 132 Pac. 999.

This view is sustained by the weight of authority. See 13 COLUMBIA LAW REVIEW 60.

DEEDS—DATE OF DELIVERY—PRESUMPTION.—In a suit to remove cloud on title, the defendant introduced the record of a deed, conveying the same land described in the deed through which the plaintiff sought

to make title, and bearing the same date, but acknowledged subsequently. *Held,* the date of the certificate of acknowledgment was evidence in the issue of the date of execution of the deed. *Johnston* v. *Kramer Bros. & Co.* (D. C. E. D. N. C. 1913) 203 Fed. 734.

The date of a deed is the date of its delivery, for the delivery is essential to the complete execution of the instrument. *Younge* v. *Guilbeau* (1865) 3 Wall. 636. In the absence of proof to the contrary, the date of execution is presumed to be the date of delivery. *Williams* v. *Armstrong* (1900) 130 Ala. 389; *Wheeler* v. *Single* (1885) 62 Wis. 380. In some states the matter is covered by statute. Cal. Civil Code (1872) §1055. By the weight of authority, the fact that the certificate of acknowledgment bears a later date does not overcome this presumption, *Smith* v. *Porter* (Mass. 1857) 10 Gray 66; *Lake Erie Ry.* v. *Whitham* (1895) 155 Ill. 514; see *Smith* v. *Scarborough* (1895) 61 Ark. 104, and this is true also when the presumption is statutory. *Gordon* v. *City of San Diego* (1895) 108 Cal. 264. Many courts, however, will presume delivery on the date of acknowledgment, *Crabtree* v. *Crabtree* (1907) 136 Ia. 630; *Johnson* v. *Moore* (1873) 28 Mich. 3; see *Windom* v. *Schuppel* (1888) 39 Minn. 35, but in some jurisdictions this is because acknowledgment is necessary to the valid execution of a deed. *Baily* v. *Selden* (1899) 124 Ala. 403. This conflict would seem to be due to the fact that ordinarily a deed is complete without the acknowledgment, which is merely for the purpose of protecting the grantee. But in the usual and regular course of business, acknowledgment precedes delivery; see *Smith* v. *Scarborough, supra;* it should not be presumed, therefore, that the delivery was made before the acknowledgment.

EQUITY—SPECIFIC PERFORMANCE—CONTRACT FOR THE SALE OF TIMBER.—The defendant contracted to sell certain standing timber, agreeing to convey upon full payment, as provided for by the terms of the agreement. *Held,* the contract should be specifically enforced. *Omaha Lumber Co.* v. *Co-operative Co.* (Colo. 1913) 133 Pac. 1112.

The courts of equity have generally granted specific performance of contracts concerning realty, on the ground that real property has no equivalent. See Maitland, Equity 237, 238; Pomeroy, Specific Performance (2nd ed.) §§ 9, 10. Since, therefore, the early common law recognized a contract for the sale of products of the soil like grass, trees, etc., as one of sufficient interest in land to fall within the Statute of Frauds, *Green* v. *Armstrong* (N. Y. 1845) 1 Denio 550; *Hirth* v. *Graham* (1893) 50 Ohio St. 57, equity would take jurisdiction. However, it would be reluctant to intervene, *Paddock* v. *Davenport* (1890) 107 N. C. 710, under the present rule that if the parties contemplate the severance of the timber from the land the contract deals with personalty, Burdick, Sales (3rd ed.) 29, 30; Uniform Sales Act § 76, since specific performance of contracts involving personal property is usually refused unless the chattel is of peculiar intrinsic worth. See Pomeroy, Specific Performance (2nd ed.) §§ 11, 12. On principle, such a distinction, see *Marthinson* v. *King* (C. C. A. 1906) 150 Fed. 48, should not be made the means of limiting the power of equity. See *Jones* v. *Newhall* (1874) 115 Mass. 244; *Telegraphone Corp.* v. *Canadian Co.* (1908) 103 Me. 444; 1 Fonblanque, Equity (2nd ed.) 34 *et seq.* Since, moreover, nothing is so perfect a compensation to the plaintiff as the very thing the defendant himself has promised to do, and since the law can rarely afford such a remedy,

the courts of equity should endeavor to grant him that relief whenever possible. See 2 Story, Equity Juris. (13th ed.) 36; Fry, Specific Performance (5th ed.) §§ 4, 47.

EVIDENCE—EXCLUSION OF OFFER OF COMPROMISE.—The plaintiff, having sustained injuries on the defendant company's road, wrote its agent notifying him of the injury, and alleging his damages to be five hundred dollars, which he offered to accept "as a compromise." He now sues for $30,500. *Held*, the letter should have been received in evidence against him. *Missouri T. & T. Ry.* v. *Sullivan* (Tex. 1913) 157 S. W. 193.

It is elementary that a person's admissions are receivable against him, 2 Wigmore, Evidence, § 1048; *Truby* v. *Seybert* (1849) 12 Pa. 101, but an offer of compromise, being merely a hypothetical concession, 2 Wigmore, Evidence, § 1061; see *Thomson* v. *Austen* (1823) 2 Dowl. & Ry. 358, 361, is according to the weight of authority excluded from evidence, since it can never be properly treated as representing the party's actual belief. *Tenant* v. *Dudley* (1895) 144 N. Y. 504; *Collie* v. *Coggins* (1894) 103 Ala. 281. In England, however, it is assumed that an offer of compromise is ordinarily receivable, but that the words "without prejudice" will exclude not only such an offer but even an independent admission of fact. *Wallace* v. *Small* (1830) 1 M. & M. 446; 2 Chamberlayne, Evidence, § 1464; see *Stewart* v. *Muirhead* (1890) 29 N. Br. 273, 279. The theory is that these words impart a contractual character to the offer, so that if the terms are not accepted, it becomes void and loses its evidential value. 2 Wigmore, Evidence, § 1061; see *In re River Steamer Co.* (1871) L. R. 6 Ch. App. 822, 832. Even in this country, an independent admission of fact is rendered inadmissible if made without prejudice, *White* v. *Old Dominion S. S. Co.* (1886) 102 N. Y. 660; *Molyneaux* v. *Collier* (1853) 13 Ga. 406, but this must be based entirely upon a desire to encourage extra-judicial settlements. For there is no apparent reason for excluding an absolute admission of fact merely because it was made in the course of negotiating a compromise, *Rose* v. *Rose* (1896) 112 Cal. 341, 344, and it would seem that the plaintiff's letter, being the first presentation of his claim, should be taken as a statement of fact, and therefore an admission. But see *St. Louis Southwestern Ry.* v. *Kern* (Tex. 1907) 100 S. W. 971.

EVIDENCE—HOMICIDE—CHARACTER OF DECEASED.—The defendant, on trial for murder, testified that the deceased was attempting to rob him when killed. *Held*, this was not such an attack upon the character of the deceased as would justify the admission of evidence of his good reputation. *State* v. *Reed* (Mo. 1913) 157 S. W. 316.

For the avoidance of undue prejudice and confusion of issues, 1 Greenleaf, Evidence 37, testimony as to the deceased's good character, in a prosecution for homicide, cannot be introduced by the state in the first instance, *State* v. *Potter* (1874) 13 Kan. 414, as an attack by the defense is necessary to render it a subject of proof. *Bloomer* v. *State* (1905) 75 Ark. 297. Where the defense has proved particular traits of violence on the part of the deceased as tending to show his bad character, evidence of his peaceableness is admissible. *Hussey* v. *State* (1888) 87 Ala. 121; *Davis* v. *People* (1885) 114 Ill. 86. By the weight of authority, however, a plea of self defense, even though involving an actual assault by the deceased, raises no such issue. *Kelly* v. *People*

(1907) 229 Ill. 81; *State* v. *Potter, supra; contra, Thrawley* v. *State* (1899) 153 Ind. 375. In some instances, *Kennedy* v. *State* (1903) 140 Ala. 1; see *State* v. *Woodward* (1905) 191 Mo. 617, this result has apparently been reached by an erroneous assumption of the identity of character and reputation, see 1 Wigmore, Evidence, § 52; *cf. Regina* v. *Rowton* (1865) 10 Cox Cr. Cas. 25, but the true theory of the exclusion is that the defendant's testimony, as in the principal case, was introduced for the purpose of proving the facts of the homicide, and not the character of the deceased from which such facts might be indirectly inferred. *Jimmerson* v. *State* (1901) 133 Ala. 18. It would seem, however, that when, as in the principal case, there is available to prove the details of the killing the testimony of none but the defendant, the resulting doubt might well be considered sufficient to warrant the admission of any testimony which could throw light upon the immediate facts and circumstances, or aid in ascertaining the probable grade of the offense. *Carroll* v. *State* (Tenn. 1842) 3 Humph. 315; see dissenting opinion, *State* v. *Eddon* (1894) 8 Wash. 292, 307.

FALSE IMPRISONMENT—JUSTIFICATION—ADVICE OF MAGISTRATE.—The defendant swore to a complaint which a magistrate drew up for him, charging the plaintiff with violating a criminal statute, but stating no facts. The plaintiff was arrested on a warrant issued on the complaint. His conduct was not covered by the statute. *Held,* the defendant was not liable for false imprisonment. *Kendel* v. *Guterl* (N. J. 1913) 87 Atl. 84.

In its solicitude to guard the liberty of the individual, the law has always carefully protected him from any legally unjustifiable restraint of person. In the civil action of false imprisonment it has imposed on the offender the burden of showing justification, *Jackson* v. *Knowlton* (1899) 173 Mass. 94; *cf. Barker* v. *Anderson* (1890) 81 Mich. 508, for his liability is predicated on the theory that he acts at his peril. See *Landrum* v. *Wells* (1894) 7 Tex. Civ. App. 625. In an action for malicious prosecution, advice of counsel is a defense, *McClafferty* v. *Philp* (1892) 151 Pa. 86; *Stewart* v. *Sonneborn* (1898) 98 U. S. 187; *contra, Gazzard* v. *Flury* (1890) 120 N. Y. 223, and so is the advice of the magistrate who issues the warrant, *Ball* v. *Rawles* (1892) 93 Cal. 222, but advice of counsel is no justification in an action for false imprisonment. 1 Jaggard, Torts, 631. The mere making of an affidavit, however, without any participation in the issuance and execution of the warrant, does not render the maker liable to an action for false imprisonment, *Gifford* v. *Wiggins* (1892) 50 Minn. 401; *Nowak* v. *Waller* (1890) 10 N. Y. Supp. 199, even though he knew the facts did not constitute an indictable offense, *Booth* v. *Kurrus* (1893) 55 N. J. L. 370, for a true statement of facts to a magistrate, who is an officer of the law, should relieve the complainant of responsibility. In the principal case, though color of jurisdiction was given by the false affidavit, still, as the defendant swore simply to a conclusion of law, it would seem that he acted only as an ordinary reasonable man in relying on the magistrate's definition of the offense. Even could he be called the real initiator of the proceedings, it would be carrying the principle too far to hold him liable for false imprisonment.

FIXTURES—CONTRACT TO RAZE BUILDING—TROVER.—The plaintiff contracted to raze a building for the defendant, receiving the materials in payment. The defendant prevented him from removing them and

he brought trover. *Held,* two judges dissenting, the action could not be maintained, as the subject matter was realty. *Melton* v. *Fullerton-Weaver Realty Co.* (1913) 142 N. Y. Supp. 852.

It is difficult to see how the common law distinction between real and personal property can be changed by an agreement so as to be binding on outside parties. Ewell, Fixtures (2nd ed.) 53; *Rogers* v. *Brokaw* (1875) 25 N. J. Eq. 496. But, between the parties themselves, since this classification is purely arbitrary, the intention should prevail, 13 COLUMBIA LAW REVIEW 247, and every attempt to repudiate the construction to which they have assented should be frustrated. Accordingly, as to the original parties, a chattel may by contract retain its character, although annexed to the freehold, *Harris* v. *Powers* (1876) 57 Ala. 139; *Long* v. *White* (1884) 42 Ohio St. 59, and trover, *Harris* v. *Powers, supra,* or replevin, see *McDaniel* v. *Lipp* (1894) 41 Neb. 713, has been maintained for a conversion thereof. Logically, therefore, even if a chattel has lost its legal identity by an unconditional attachment to the realty, a later agreement could restore it to its former condition. See *Board of Commissioners* v. *Stubbs* (1881) 25 Kan. 322; *Rogers* v. *Cox* (1884) 96 Ind. 157, 160; *Tyson* v. *Post* (1888) 108 N. Y. 217. In the main case, therefore, inasmuch as there were no interests of third parties involved, the contract should have been construed as effecting a constructive severance. See Ewell, Fixtures (2nd ed.) 65 *et seq.* Indeed, this principle has been extended to cases where the property in question had never in fact existed as personalty, as in the case of growing timber, *Bostwick* v. *Leach* (Conn. 1809) 3 Day 476, for which trover has been maintained, *Kingsley* v. *Holbrook* (1864) 45 N. H. 313, under a contract contemplating its severance. See 1 Reeves, Real Prop. § 53.

INFANTS—CONTRACTS—AVOIDANCE—RETURN OF CONSIDERATION.—The plaintiff brought assumpsit to recover payments made by him, while a minor, on a lease that he disaffirmed on coming of age. *Held,* as the contract was not for necessaries, the infant could recover all he had paid without putting his adversary in *statu quo. Ex parte McFerren* (Ala. 1913) 63 So. 159, reversing *Edgewood Land Co.* v. *McFerren* (Ala. 1913) 63 So. 157.

In England, an infant is denied the right to avoid an executed contract whereby he has benefited, and recover back what he has paid. *Holmes* v. *Blogg* (1818) 8 Taunt. 508; *Valentini* v. *Canali* (1889) 24 Q. B. D. 166. In the United States, this right is generally granted, but there is much conflict as to the necessity of returning the consideration received. 1 Parsons, Contracts (9th ed.) 365, n. 1. It has been held that the consideration must be restored as a condition precedent to recovery. *Bartholomew* v. *Finnemore* (N. Y. 1854) 17 Barb. 428. The weight of judicial opinion, however, holds that the infant need restore only so much of the consideration as he has when he disaffirms the contract; see *MacGreal* v. *Taylor* (1897) 167 U. S. 688; but if he has consumed or lost it, he need not return its equivalent. *Fox* v. *Drewry* (1896) 62 Ark. 316; *Miller* v. *Smith* (1879) 26 Minn. 248. Some courts of law do not require a return of the consideration, even though it lies within the infant's power, but allow a cross action. *Shuford* v. *Alexander* (1884) 74 Ga. 293. It may be argued that an infant should be as fully protected against the performance of his contracts, as against his promises to perform. *Miller* v. *Smith, supra.* On the other hand, if an infant's disaffirmance

avoids his executed contract, to be logically consistent it should avoid it altogether, and the plaintiff should be obliged to put the defendant in *statu quo;* Clark, Contracts (2nd ed.) 174 (d); *Rice* v. *Butler* (1899) 160 N. Y. 578; *Heath* v. *Stevens* (1869) 48 N. H. 251; for "the privilege of infancy is to be used as a shield and not as a sword". 2 Kent, Commentaries *240.

INSURANCE—INSURABLE INTEREST—BENEFICIARY'S RIGHT TO RECOVER.—Where the insured deserted his wife and lived with another woman, making the latter the beneficiary of an insurance policy upon his life, *held,* the beneficiary could recover the amount of the policy, irrespective of her interest in the insured's life. *Mutual Benefit Life Ins. Co.* v. *Cummings* (Ore. 1913) 133 Pac. 1169. See Notes, p. 739.

INSURANCE—INSURABLE INTEREST NECESSARY IN FIRE POLICIES.—A husband insured his wife's property, in which he had no rights. *Held,* he could not recover on the policy. *Oatman* v. *Banker's & Mer. Mut. Fire Relief Assn.* (Ore. 1913) 133 Pac. 1183. See Notes, p. 739.

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—STIPULATION TO ARBITRATE.—In a contract of insurance between the plaintiff's intestate and the defendant, it was stipulated that all questions in dispute should be decided finally by certain arbitrators. *Held,* the stipulation was a bar to plaintiff's action. *Pennsylvania Co.* v. *Reager's Admr.* (Ky. 1913) 154 S. W. 412.

A stipulation in a contract providing that an adjudication by arbitrators be made to determine a question of fact, has been generally upheld, on the theory that the making of the award was a condition precedent. *D. & H. Canal Co.* v. *Pa. Coal Co.* (1872) 50 N. Y. 250; *contra, Hartford Fire Ins. Co.* v. *Hon* (1902) 66 Neb. 555; *cf.* 11 Harvard Law Review 134. The general rule, however, is well established that agreements to arbitrate future controversies *in toto* are invalid as tending to obstruct the course of justice. 2 Parsons, Contracts (9th Ed.)* 708 *et seq;* see 8 COLUMBIA LAW REVIEW 409. Nevertheless, some courts have refused to apply this rule to insurance contracts with mutual benefit associations. *Canfield* v. *Knights of Maccabees* (1891) 87 Mich. 626; *Osceola Tribe* v. *Schmidt* (1881) 57 Md. 98. This distinction, though scarcely to be supported on theory, is based upon the argument that the utility of an organization formed for beneficent purposes would otherwise be seriously impaired by petty litigations. *Osceola Tribe* v. *Schmidt, supra.* In making such an exception, the courts have empirically balanced conflicting arguments of expediency, and permitted freedom of contract to prevail over the injury to their dignity and the general policy to confine litigation to the tribunals established by law. The decision of the principal case, in discriminating in favor of mutual benefit associations, would seem, therefore, to indicate a sound tendency to limit the application of the established rule in this particular field of insurance contracts. But see *B. & O. R. R.* v. *Stankard* (1897) 56 Oh. St. 224.

LIENS—TAX LIENS—FORECLOSURE OF STATUTORY LIEN IN EQUITY.—A municipal corporation brought a bill to foreclose a statutory tax lien. *Held,* equity has no jurisdiction where the statute provides an adequate remedy. *Greil Bros.* v. *City of Montgomery* (Ala. 1913) 62 So. 692.

According to the rule that equitable relief is not lost when equitable

principles are embodied in a statute providing some other adequate remedy, *Payne* v. *Bullard* (1851) 23 Miss. 88, a statutory adoption of a lien equitable in its nature leaves intact the right to equitable enforcement, *Thrasher* v. *Doig* (1882) 18 Fla. 809, unless such enforcement is expressly abrogated by the terms of the statute. See *Crass* v. *M. & C. R. R.* (1892) 96 Ala. 447. A strictly common law lien, on the other hand, gives only a right of possession to the lienor, *Thames Iron Works Co.* v. *Patent Derrick Co.* (1860) 1 J. & H. 93, and some confusion has arisen by reason of the occasional application to them of equitable relief. *Black* v. *Brennan* (Ky. 1837) 5 Dana 310; *Arians* v. *Brickley* (1885) 65 Wis. 26. It now seems established, however, that a pure common law lien cannot be enforced in equity, *Borrough* v. *Ely* (1903) 54 W. Va. 118, in absence of some collateral excuse for equitable intervention. See *Aldine Mfg. Co.* v. *Phillips* (1898) 118 Mich. 162. Consequently, a statute creating a lien analogous to such as existed at common law is unenforcible in equity, 1 Jones, Liens (2nd ed.) § 94, and this principle has been carried over to statutory liens of a novel character, *Aldine Mfg. Co.* v. *Phillips, supra,* subject to the right of equity to step in if no adequate method of enforcement is provided, *Gibbons* v. *Hamilton* (N. Y. 1867) 33 How. Pr. 83; see *Fackney* v. *C. & B. R. R.* (1875) 78 Ill. 116; *contra,* 1 Jones, Liens (2nd ed.) § 94, but such statutes are strictly construed, and equity may not extend relief beyond the ground expressly covered by them. *Canal Co.* v. *Gordon* (1867) 6 Wall. 561. A tax lien, being solely a creation of statute, *Sheffield City Co.* v. *Bank* (1901) 131 Ala. 185, is, therefore, not enforcible in equity unless the statute contains no provision for enforcement. *Gibbons* v. *Hamilton, supra.*

LIMITATION OF ACTIONS—DISABILITY—ASSIGNMENT OF ACTIONS.—In an action to redeem from a tax sale, the plaintiff seeks to avoid the Statute of Limitations by showing that his grantor, to whom the right originally accrued, was and still is a married woman. The statute allowed a person under disability to redeem within one year after the disability was removed. *Held,* he had only one year from the time he took title. *Sehon* v. *Bloomer* (W. Va. 1913) 78 S. E. 105.

Since the defense of the Statute of Limitations, so far as it affects title to property, is generally regarded as a property right, see *Campbell* v. *Holt* (1885) 115 U. S. 620, it is argued that the suspension of the statute, due to disability, is a property right, assignable and inheritable in connection with the cause of action, and consequently suspends the running of the statute against assignees until the removal of the disability of the assignor. *McNamara* v. *Baird* (1893) 72 Miss. 89; *Bush* v. *Lindsay* (1854) 14 Ga. 687; see *Huls* v. *Buntin* (1868) 47 Ill. 396. It is urged, on the other hand, that the disability of the owner of the chose ceases with respect to the chose when she alienates it; *Demarest* v. *Wynkoop* (N. Y. 1817) 3 Johns. Ch. 129; *Williams* v. *Council* (N. C. 1856) 4 Jones' Law 206; *McGee* v. *Bailey* (1892) 86 Ia. 513; and as the cause of action is now in the hands of a person capable of enforcing it, the reason for the privilege ceases, and the privilege should fall with it. *Gibbs* v. *Sawyer* (1878) 48 Ia. 443. The first view is correlative to the rule that a plaintiff may avail himself only of a disability which existed when the cause of action accrued; the second qualifies the rule by requiring that the plaintiff must confine himself to disabilities which existed as to himself when the action accrued. *McGee* v. *Bailey, supra.* Either is consistent with the statutory provision that an heir or assignee must bring suit within one year

after the removal of the disability. 1906 W. Va. Code § 889. Considerations of expediency strongly favor the latter interpretation; on principle, moreover, it would seem that the view which regards the Statute of Limitations as a property right is hardly to be extended.

OFFICERS—POWER OF COURTS TO REVIEW GOVERNOR'S ACTS.—The incumbent, without fair notice or opportunity to be heard, had been summarily removed from office by the Governor, who was authorized by statute to remove "for cause upon satisfactory proof". He now seeks to enjoin the governor's agents from forcibly putting the appointee into possession. *Held,* that the incumbent had been deprived of his office without due process of law. *Ekern* v. *McGovern et al.* (Wis. 1913) 142 N. W. 595.

Because of the theory of separated powers, *Sutherland* v. *Governor* (1874) 29 Mich. 320, the courts decline to review any act involving the exercise of the governor's discretion, *Hawkins* v. *Governor* (1839) 1 Ark. *570; *Householder* v. *Morrill* (1895) 55 Kan. 317; *State ex rel. Att'y Gen'l* v. *Doherty* (1873) 25 La. Ann. 119, and even where the act is ministerial they refuse to take jurisdiction, on the ground that the act is purely executive. *Sutherland* v. *Governor, supra; State ex rel. Bisbee* v. *Drew* (1879) 17 Fla. 67; but see *Cooke* v. *Iverson* (1909) 108 Minn. 388. Where the governor, however, is empowered by a statute to remove an officer for cause, they have the right to inquire into his power and jurisdiction, *Cameron* v. *Parker* (1884) 2 Okla. 277; *State ex rel. Att'y Gen'l* v. *Johnson* (1892) 30 Fla. 487; *State ex rel. Kinsella* v. *Eberhardt* (1911) 116 Minn. 313, and when the legislature confers upon the governor power to remove after a compliance with certain formalities, it has been held that the observance of such formalities is a condition precedent to the valid exercise of the power. *People ex rel. Metevier* v. *Therrien* (1890) 80 Mich. 187. Except where by statute the governor may remove "when we shall deem it for the best interests of the state", in which case his finding, no matter how erroneous, should, of course, be beyond the cognizance of the courts, *People ex rel. Clay* v. *Stewart* (1889) 74 Mich. 411; *Att'y Gen'l ex rel. Taylor* v. *Brown* (1853) 1 Wis. 513, it is submitted that it would be a justifiable extension of authority for the courts to examine, as in the case of a jury, not the correctness of the governor's decision, but whether there was any legal evidence in support of it. *State ex rel. Kinsella* v. *Eberhardt, supra.* The principal case, moreover, is correctly based on the assumption that since the statute authorized the governor to remove only for cause, the incumbent should have been given fair notice and an opportunity to be heard. *Dullam* v. *Wilson* (1884) 53 Mich. 392; but see *Wilcox* v. *People ex rel. Lipe* (1878) 90 Ill. 186.

PARTY WALLS—DURATION OF PARTY WALL RIGHTS.—The plaintiff purchased an easement of support in the defendant's wall. Subsequently the defendant's building was destroyed by fire, but the wall remained standing, sufficiently strong to support the plaintiff's building. *Held,* the destruction of the defendant's building did not affect the plaintiff's easement. *Commercial Nat. Bank* v. *Eccles* (Utah 1913) 134 Pac. 614.

Party wall rights usually originate in contract, and their duration, under such circumstances, obviously depends on the intention of the parties. In the absence of express language to the contrary the courts have interpreted this intention as limiting these rights to the particu-

lar wall. *Huck* v. *Flente* (1875) 80 Ill. 258; *Sherred* v. *Cisco* (N. Y. 1851) 4 Sandf. 480. The principal case is, therefore, correct in holding that the plaintiff's right was in the wall, and consequently was unaffected by the destruction of the defendant's building. See *Brondage* v. *Warner* (N. Y. 1841) 2 Hill 145. The above rule of construction is salutary, because such restrictions upon the use of property militate against its progressive development, and should be limited, rather than extended, by implication. See Jones, Easements, § 646; *Partridge* v. *Gilbert* (1857) 15 N. Y. 601; but see *Hoffman* v. *Kuhn* (1880) 57 Miss. 746; *cf. Lodge* v. *Beal* (1909) 94 Miss. 521. However, the expression, so often occurring in the authorities, that the destruction of a party wall terminates all rights therein, cannot be taken as a universal standard of the duration of party wall rights, for frequently they arise out of necessity, in which event they are co-extensive with the necessity that creates them. *Heartt* v. *Kruger* (1890) 121 N. Y. 386. This necessity is presented by the severance of title over two houses which are so constructed as to depend upon a common wall for support, and until both houses are destroyed the easements of support endure. *Rogers* v. *Sinsheimer* (1873) 50 N. Y. 646; *Eno* v. *Del Vecchio* (N. Y. 1854) 4 Duer 53; see *Richards* v. *Rose* (1853) 24 E. L. & Eq. R. 406.

PLEADING—MORTGAGEE ANSWERING COMPLAINT IN PARTITION SUIT.—In foreclosure proceedings by a mortgagee who had been made a party defendant in an action to partition the mortgaged property, *held,* the pendancy of the partition action did not bar him. *Harlem Savings Bank* v. *Larkin* (N. Y. 1913) 156 App. Div. 666.

Inasmuch as the main question in an action of partition is the title of the several parties who claim as tenants in common, the granting of the decree will not affect the rights of creditors. *Speer* v. *Speer* (1862) 14 N. J. Eq. 240; *Greiss* v. *Noisky* (N. J. Eq. 1913) 87 Atl. 155. A mortgagee, therefore, is not a necessary party under the provisions of the code, Code of Civ. Proc., § 1538, and there is some authority for the proposition that he is not even a proper party to the action, and that his answer should be stricken out as tending to engraft upon the proceedings something which would delay and embarrass the suit. *Greiss* v. *Noisky, supra.* When, however, he is joined as a party defendant, and sets up in answer his mortgage with a demand for affirmative relief, it does not tend to defeat, lessen, or modify the decree sought by the tenants in common, and does not come under the code definition of a counterclaim, Code of Civ. Proc., § 501, so as to operate as a bar to his independent action. Pomeroy, Code Rem. (4th ed.) 620; *Dinan* v. *Coneys* (1894) 143 N. Y. 544; *Lipman* v. *J. A. I. Works* (1891) 128 N. Y. 58. The case is distinguishable from those where the primary action is to foreclose a mortgage, and either a prior or subsequent mortgagee is made a party defendant, for in that event the defendant has a right to obtain a judgment enforcing his lien, and should necessarily be concluded from increasing litigation by bringing a separate action on his mortgage.

PRINCIPAL AND SURETY—PENAL BOND—INTEREST.—In an action on a contractor's bond, *held,* the surety is liable for interest even though this causes the judgment to exceed the penalty of the bond. *Empire State Surety Co.* v. *Lindenmeier* (Colo. 1913) 131 Pac. 437.

Starting from the general proposition that the penalty of a bond

fixes the utmost limit of the liability of the surety, the courts of England and of some of our own jurisdictions hold that the surety is not liable for interest in excess of the penalty. *Tew* v. *Earl of Winterton* (1792) 3 Bro. Ch. 489; *Fraser* v. *Little* (1865) 13 Mich. 195. There is a theory also that at common law no debt ever drew interest, and that since the statutory interest of to-day is founded always on the supposition of a loan, it does not apply to a penal bond. *New Home Sewing Machine Co.* v. *Seago* (1901) 128 N. C. 158; *Cherry's Executors* v. *Mann* (Tenn. 1813) Cooke 268. But the majority of courts in the United States allow such interest beyond the penalty on the ground that this interest represents damages for the failure of the surety to discharge his obligation when it accrued at the time of default. *Bank of Brighton* v. *Smith* (Mass. 1866) 12 Allen 243, 251. They draw a distinction between the liability of the surety for his principal's default, which is limited by the penalty of the bond, and his liability for his own wrongdoing in failing to discharge the obligation created by the bond. *Brainard* v. *Jones* (1858) 18 N. Y. 35. They also urge that the penalty with interest from the time of default is no more than the penalty without interest on the day it became due. *Wyman* v. *Robinson* (1882) 73 Me. 384. This distinction between interest and damages measured by the current rate of interest seems sound, and is of wide application. See *Case Plow Works* v. *Niles & Scott Co.* (Wis. 1900) 82 N. W. 568; 13 COLUMBIA LAW REVIEW 656. It would, moreover, allow recovery beyond the penal sum even in jurisdictions like North Carolina where the statute provides that penal bonds shall not bear interest. *New Home Sewing Machine Co.* v. *Seago, supra.*

PUBLIC SERVICE COMPANIES—RATE REGULATION—"GOING VALUE".—In passing upon rates fixed by a Public Service Commission, *held,* allowance should have been made for "going value". *People ex rel. Kings County Lighting Co.* v. *Wilcox* (App. Div. 1913) 141 N. Y. Supp. 677.

Upon writs presented by a gas company and by the cities served by the company, questioning the validity of certain rates, *held,* the allowance of $1,025,000 for "going value" was correct. *Public Service Gas Co.* v. *Board of Public Utility Commissioners* (N. J. 1913) 87 Atl. 651. See Notes, p. 730.

SALES—RESALE BY UNPAID VENDOR—NOTICE.—The plaintiff, having entered into a contract for the sale of lambs to the defendant, who refused to perform, resold the lambs and sued for the difference in price. *Held,* he did not have to give the defendant notice of resale, as the contract was executory. *Leeper* v. *Schroeder* (Colo. 1913) 132 Pac. 701.

While it is generally conceded that no notice of the time and place of resale need be given the defaulting purchaser, *Rosenbaums* v. *Weeden* (Va. 1868) 18 Gratt. 785; Burdick, Sales (3rd ed.) 290, there is much conflict as to the necessity of giving notice of intention to exercise the right of resale. See *Leonard* v. *Portier* (Tex. 1890) 15 S. W. 414; Tiffany, Sales (2nd ed.) 341. In many jurisdictions, unless the goods are perishable, notice of intention to resell must be given, and the buyer has a reasonable time thereafter within which he may tender payment. *Redmond* v. *Smock* (1867) 28 Ind. 365; *Sims-McKenzie Co.* v. *Patterson* (1912) 10 Ga. App. 742. That is the present English doctrine; Sale of Goods Act (1894) 56, 57 Vict. c. 71, § 48

(3); but formerly, under the English common law, though notice was usually given, it was nowhere expressly declared necessary. Benjamin, Sales (5th ed.) 950. The weight of authority in this country to-day sustains the rule of the Uniform Sales Act, N. Y. Pers. Prop. Law (1911) § 141 (3), that notice is not essential. *Waples* v. *Overaker* (1890) 77 Tex. 7; Williston, Sales, § 548; *cf. Magnes* v. *Sioux City Seed Co.* (1900) 14 Colo. App. 219. The distinction between executed and executory contracts, suggested in the principal case, is without foundation, for, in either case, notice merely gives the vendee another chance to perform, or to protect himself against a fraudulent resale. See *McDonald Cotton Co.* v. *Mayo* (Miss. 1905) 38 So. 372. Where, however, the default consists in the buyer's refusal to perform, this additional opportunity is clearly superfluous. *Clore* v. *Robinson* (1897) 100 Ky. 402; Burdick, Sales (3rd ed.) 290. If the resale is unfair, moreover, it will not be accepted as a measure of damages. See *Ackerman* v. *Rubens* (1901) 167 N. Y. 405.

SPECIFIC PERFORMANCE—MUTUALITY—UNILATERAL CONTRACTS.—A testator offered to devise land to the plaintiff, if the latter would care for her until her death. The plaintiff strictly performed the terms of the offer, but by the testator's will the land was devised to the defendant. On suit to compel conveyance, *held,* specific performance of the contract should be granted. *Howe* v. *Benedict* (Mich. 1913) 142 N. W. 768. See Notes, p. 737.

STATES—PRIORITY OF PUBLIC CLAIMS—SUBROGATION.—The plaintiff, surety for an insolvent bank, having paid the bank's debt to the state, sued its receiver for the amount. *Held,* the plaintiff was subrogated to the state's priority over private creditors. *American Bonding Co. of Baltimore* v. *Reynolds* (D. C. Mont. 1913) 203 Fed. 356.

At common law, the king was entitled to priority in the payment of all debts. See *Giles* v. *Grover* (1832) 9 Bing. 128, 275. Since this priority is consistent with the idea of the sovereignty of the people, but see *Freeholders* v. *State Bank* (1878) 29 N. J. Eq. 268, affirmed 30 N. J. Eq. 311, it is in force in those jurisdictions which have adopted the common law of England; *Seay* v. *Bank of Rome* (1881) 66 Ga. 609, 615; *Matter of Carnegie Trust Co.* (N. Y. 1912) 151 App. Div. 606; *contra, Central Trust Co.* v. *Third Ave. Ry.* (C. C. A. 1911) 186 Fed. 291; in some states, however, it has been abolished by statute. *State* v. *Wright's Admrs.* (La. 1829) 8 Mart. [N. S.] 316. In many jurisdictions where debts due the state are made liens, this prerogative is continued in all its common law strength so as to make them paramount liens, although the statute is silent as regards priority. *Minnesota* v. *Central Trust Co.* (C. C. A. 1899) 94 Fed. 244; *New England Loan & Trust Co.* v. *Young* (1890) 81 Ia. 732; but see *William Wilson etc. Co. Estate* (1892) 150 Pa. 285. There is no good reason why a transfer of the property to a receiver should defeat the right of priority, *Central Trust Co.* v. *N. Y. C. & Northern Ry.* (1888) 110 N. Y. 250; *State* v. *Bell* (1896) 64 Minn. 400, although some courts have held that the appointment of a receiver, by taking the property out of the debtor's hands, does away with the preference. *State* v. *Williams* (1905) 101 Md. 529; *Freeholders* v. *State Bank, supra.* Where the right of priority exists, it is well established that a payment of the state's claim by a surety, as in the principal case, subrogates him to the state's preference. *Hunter* v. *United States* (1831) 5 Pet. 173, 182; *Orem* v. *Wrightson* (1878) 51 Md. 34.

STATUTE OF FRAUDS—ACCEPTANCE AND RECEIPT.—The plaintiff, having contracted orally with the defendant for the purchase of certain books in their common possession, pasted labels bearing his name upon them and assumed ownership of them. *Held,* there was no receipt to take the transaction out of the Statute of Frauds. *Young* v. *Ingalsbe* (1913) 208 N. Y. 503.

To validate an oral contract, the evidence of the acceptance and receipt required by the Statute of Frauds, *Shindler* v. *Houston* (1848) 1 N. Y. 261, must rest in unequivocal acts of the parties, and mere words, which would pass title at common law, are not sufficient. *Knight* v. *Mann* (1875) 118 Mass. 143; *Dehority* v. *Paxson* (1884) 97 Ind. 253; 1 Mechem, Sales, §§ 377, 383. While, in England, any dealing with the goods which amounts to a recognition of the contract is a sufficient acceptance, *Page* v. *Morgan* (1885) 15 Q. B. D. 228, the American courts require a final taking of the goods under the contract. *Stone* v. *Browning* (1877) 68 N. Y. 598; Burdick, Sales (3rd ed.) 93. A receipt, however, implies the acquisition of possession, a divesting of the vendor's lien, see *Hallock* v. *Alvord* (1891) 61 Conn. 194, and a taking into possession by the vendee. *Hinchman* v. *Lincoln* (1888) 124 U. S. 38; Williston, Sales 92. If, however, the goods are already in the possession of the buyer, any clear act of ownership on his part, because of the inference arising from the seller's acquiescence in it, would seem to satisfy the statute. *Edan* v. *Dudfield* (1841) 1 Q. B. 302; *Snider* v. *Thrall* (1883) 56 Wis. 674; Browne, Statute of Frauds (5th ed.) § 322. But the principal case, following prior New York decisions, *Hawley* v. *Keeler* (1873) 53 N. Y. 114; *Rodgers* v. *Phillips* (1869) 40 N. Y. 519, requires evidence of acts both of delivery by the vendor and of taking possession by the vendee to prove a receipt, though the statute is silent upon the kind of proof required. Browne, Statute of Frauds (5th ed.) § 320; Williston, Sales 96; *cf. Calkins* v. *Lockwood* (1845) 17 Conn. 154. It logically follows under this view that goods, not readily deliverable, are incapable of acceptance and receipt within the Statute of Frauds.

STATUTE OF FRAUDS—SALE OF GOODS—PAYMENT BY CREDIT.—Under an oral contract of sale the vendee, a creditor of the vendor, agreed to and subsequently did credit the vendor on his books. *Held,* the contract was void under the Statute of Frauds because the credit was not given at the time of the contract and the deceased "was in no way an actor in regard to it". *Young* v. *Ingalsbe* (1913) 208 N. Y. 503.

A mere agreement, contained in the contract of sale, to apply in payment a debt due the buyer does not satisfy the Statute of Frauds. See 1 Mechem, Sales 416; *Walrath* v. *Richie* (N. Y. 1872) 5 Lans. 362; *Artcher* v. *Zeh* (N. Y. 1843) 5 Hill 200. Not only do the New York courts, in accordance with the weight of authority, require some overt act in addition to the agreement to give credit, unequivocally indicating the intention of the parties to substitute credit for part payment, *Mattice* v. *Allen* (N. Y. 1867) 3 Abb. Ct. App. Dec. 248; *Milos* v. *Covacevich* (1901) 40 Ore. 239; *Johnson* v. *Tabor* (Miss. 1912) 57 So. 365, but even hold that the secret entry of the credit on the blank leaf of a book "not connected with the seller's account" is insufficient. *Teed* v. *Teed* (N. Y. 1865) 44 Barb. 96; see *Brabin* v. *Hyde* (1865) 32 N. Y. 519-523. The looseness of the court's language, however, makes it extremely difficult to determine whether the principal case falls within the accepted doctrine of the jurisdiction or whether it

goes still further by requiring a physical act on the part of both parties. This affords an excellent illustration of the uselessness of the Statute of Frauds as a guide to business conduct, due to the uncertainties involved in its interpretation. The principal case, however, is sound, for although the Uniform Sales Act does not require part payment to be made at the time of the contract, Burdick, Law of Sales (3rd Ed.) 44 n. 1; N. Y. Laws 1911 ch. 571, § 85, yet since the original action was brought under the former statute, the Sales Act did not govern. See 12 COLUMBIA LAW REVIEW 378.

WILLS—CONSTRUCTION—"SURVIVOR" AS "OTHER".—After a life interest, the testator devised his property equally to his seven children, providing that his five daughters should enjoy the income of their respective shares for life, and that if any should die without issue her share should be equally divided among the surviving brothers and sisters; but if such deceased daughter should have issue, her share to such issue. *Held,* the issue of a deceased child could not share with the other children in the estate of a daughter dying without issue. *Baker* v. *Baker* (Ala. 1913) 62 So. 284.

In the absence of a limitation over in case none of the class has issue, which would indicate the testator's intention to have the members of the group take in every other contingency, *Wake* v. *Varah* (1876) L. R. 2 Ch. Div. 348; *Smith* v. *Smith* (1908) 157 Ala. 79, the weight of authority construes the language strictly and refuses to regard the word "survivors" as synonymous with "others". *Guernsey* v. *Guernsey* (1867) 36 N. Y. 267; *Harrison* v. *Harrison,* L. R. [1901] 2 Ch. 136. Regard, however, for the conceded probable intention of the testator to distribute his estate equally among the individuals of the group, *Bacon's Estate* (1902) 202 Pa. 535; *Badger* v. *Gregory* (1869) L. R. 8 Eq. Cas. 78, and an endeavor to avoid intestacy, *Smith* v. *Osborne* (1857) 6 H. L. *374, have led to many contrary holdings. A very reasonable solution, which unfortunately has not been followed, is to construe "survivors" as "others" wherever the gift to the survivors is to take effect upon the decease of any members of the class, combined with some collateral event, since the testator did not primarily intend the ulterior gift to rest upon survivorship but upon death without issue. *Ainton* v. *Brooks* (1834) 7 Sim. *204. It is submitted that in the principal case, since the words of divestiture are attached to the gift to the issue, the heirs of the son who predeceased his sister, dying without issue, might have been permitted to share stirpitually, upon the theory that all other children had a vested remainder in the estate of any one of the daughters, subject to be divested only upon her leaving issue. *Cf. Graves* v. *Spurr* (1895) 97 Ky. 651.